

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Promoting the Availability of Diverse and)	MB Docket No. 16-41
Independent Sources of Video Programming)	

REPLY COMMENTS OF RFD-TV

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RFD-TV hereby submits these reply comments in response to the Notice of Proposed Rulemaking issued in the above-captioned docket.¹

INTRODUCTION AND SUMMARY

RFD-TV is dedicated to serving the needs and interests of rural America while reconnecting city and country. In RFD-TV’s experience, there is a clear and growing wall being built between urban and rural America. Unfortunately, the current video marketplace is only increasing this growing disconnect. While some large programming conglomerates and large multichannel video programming distributors (“MVPDs”) tout the diversity of their programming offerings, the reality is that a handful of urban-based media companies with bottleneck control over the distribution of programming are deciding for the American people what constitutes “diverse” programming. Noticeably missing from their “diverse programming,” however, is content catering to rural interests and senior citizens—two of the largest underserved populations in America. While RFD-TV’s unique programming serves the needs and interests of rural as well as urban Americans and senior citizens, current marketplace constraints imposed by large MVPDs are preventing RFD-TV from reaching these viewers.

¹ *Promoting the Availability of Diverse and Independent Sources of Video Programming*, Notice of Proposed Rulemaking, 31 FCC Rcd 11352 (2016) (“*NPRM*”).

The record in this proceeding shows that RFD-TV is not alone in its experience. There is widespread agreement that today's video marketplace is failing to meet the needs of consumers and that independent programmers face significant obstacles in reaching viewers.

Anticompetitive practices by MVPDs impede competition and restrict consumers' access to independent and diverse programming. If independent voices such as RFD-TV are to thrive, the country needs a clear policy and comprehensive efforts to protect and promote independent programming. The Commission should therefore take immediate action and adopt its proposed rules prohibiting unconditional most favored nation ("MFN") and unreasonable alternative distribution method ("ADM") provisions in carriage agreements between independent programmers and MVPDs. In addition, the Commission should adopt rules that address MVPD practices such as bundling, lengthy contracts, and high termination fees. By prohibiting these most egregious abuses of market power by large media conglomerates against independent programmers, the Commission will take a modest first step towards its comprehensive effort to promote and protect independent programmers.

DISCUSSION

I. THE COMMISSION SHOULD ADOPT A MORE LIMITED DEFINITION OF "INDEPENDENT VIDEO PROGRAMMING VENDOR."

The record establishes widespread agreement that defining an independent programmer as a programmer that is "not vertically integrated with an MVPD" is too general for the purposes of this proceeding. As several commenters point out, defining independent programmer in this manner is overly broad and has the potential to incorporate many large programmers that already are well-positioned to negotiate fair terms of carriage.² The Commission's proposed rules should

² See, e.g., Joint Comments of The American Cable Association, MAVTV Motorsports Network, One America News Network and AWE, and Ride Television Network, Inc., MB Docket No. 16-

address the genuine and persistent market failure that has prevented small independent programmers from reaching consumers—a market failure that is not present with respect to large programming companies. In order to protect truly independent programmers the Commission must ensure that any definition of “independent video programming vendor” safeguards independent programmers during carriage agreement negotiations without providing larger, established programmers with an unnecessary advantage.³

RFD-TV agrees with fellow commenters that the Commission should adopt ITTA’s proposed definition of “independent video programming vendor” as a programmer “not affiliated with a broadcast network, movie studio, or MVPD.”⁴ As beIN SPORTS states, ITTA’s definition provides “an adequate delineation between programmers that possess negotiation leverage by virtue of shared ownership with powerful media properties and those, like beIN, that do not.”⁵ ITTA’s definition of independent programmer would protect small programmers who lack the leverage to negotiate fair terms with the bottleneck MVPDs without being so broad as to include large corporations that do not need the government’s assistance. By adopting this narrower definition of independent programmer, the Commission will help ensure that genuinely independent voices are protected during carriage negotiations.

41 at 20 (filed Jan. 26, 2017) (“ACA et al. Comments”); Comments of FUSE Media, Inc., MB Docket No. 16-41 at 9 (filed Jan. 26, 2017) (“FUSE Comments”).

³ See Comments of RFD-TV, MB Docket No. 16-41 at 7-8 (filed Jan. 26, 2017) (“RFD-TV Comments”).

⁴ See, e.g., ACA et al. Comments at 20; Comments of beIN SPORTS, LLC, MB Docket No. 16-41 at 16 (filed Jan. 26, 2017) (“beIN SPORTS Comments”); Comments of ITTA – The Voice of Mid-Size Communications Companies, MB Docket No. 16-41 at 3 (filed Jan. 26, 2017) (“ITTA Comments”).

⁵ beIN SPORTS Comments at 16.

II. THE COMMISSION SHOULD ADOPT ITS PROPOSED RULES PROHIBITING UNCONDITIONAL MFN AND UNREASONABLE ADM CLAUSES IN CARRIAGE AGREEMENTS.

A. The record supports the Commission’s proposal to prohibit unconditional MFNs that prevent independent programmers from entering into innovative carriage arrangements.

There is widespread agreement that independent programmers such as RFD-TV generally lack the bargaining power necessary to resist MVPDs’ demands for unreasonable and unfair MFN treatment. As ITTA points out, this lack of bargaining leverage means that independent programmers are “particularly in need of protection” from unconditional MFN provisions when dealing with large MVPDs.⁶ By demanding unconditional MFNs with little or no opportunity for negotiation, MVPDs present MFN clauses as take-it-or-leave-it provisions, essentially forcing independent programmers to accept the MVPD’s conditions regardless of how harmful they may be.⁷ The record makes clear that unconditional MFN provisions often require providers to offer the same terms to all distributors, thereby restricting content providers such as RFD-TV from entering into unique deals with new distributors and limiting their ability to reach new audiences and build brand recognition.⁸ As Aspire aptly notes, these “one-size-fits-all demands of some MVPDs stifle the very innovation and investment that, but for these provisions, independent programmers are well positioned to undertake to meet the individualized

⁶ ITTA Comments at 8.

⁷ See, e.g., Comments of Cinémoi, MB Docket No 16-41 at 5 (filed Jan. 26, 2017) (“Cinémoi Comments”) (“[T]he disparity in leverage between independent programmers and MVPDs produces de facto ‘take it or leave it’ carriage proposals that leave little room for negotiation...”); Comments of INSP, LLC, MB Docket No. 16-41 at 24 (filed Jan. 26, 2017) (“INSP Comments”) (“MFNs simply have been imposed on a take-it-or-leave-it basis with no additional consideration given in exchange for acceptance of an MFN’s onerous requirements and burdensome consequences”).

⁸ See, e.g., beIN SPORTS Comments at 12; Cinémoi Comments at 5; FUSE Comments at 6; ITTA Comments at 8; Comments of Public Knowledge, MB Docket No. 16-41 at 5 (filed Jan. 27, 2017) (“Public Knowledge Comments”).

and unique business needs of each of their MVPD customers and markets.”⁹ For example, RFD-TV might be willing to offer a lower per-subscriber fee to an MVPD that provides RFD-TV with broad penetration, or pursue carriage via an online video distributor (“OVD”) that could help RFD-TV reach viewers whose incumbent cable operator does not carry RFD-TV or has relegated RFD-TV to a low-penetrated tier. In such instances, however, RFD-TV is prohibited from entering into mutually beneficial business arrangements because of pre-existing MFN provisions that RFD-TV was forced to accept.

In the end, it is consumers who suffer from these restrictive provisions. As Senator Claire McCaskill noted in a recent letter, “MFNs may work to exclude smaller rivals and new entrants to the market, thereby limiting innovation that may benefit consumers.”¹⁰ The many thousands of letters from RFD-TV fans filed in this proceeding confirm that the current marketplace does not serve consumers effectively.

Comcast and NBCUniversal suggest that independent programmers “have the ability to *bypass* traditional program networks and MVPD carriage altogether via the Internet” and thus avoid any distribution challenges imposed by burdensome contract clauses such as unconditional MFN provisions.¹¹ As numerous commenters explain, however, traditional distribution channels such as cable and DBS remain the dominant pathway to reaching video consumers, and MVPD distribution offers a revenue stream that cannot yet be replaced by distribution on emerging OVD

⁹ Comments of Aspire Channel, LLC and UP Entertainment, LLC, MB Docket No. 16-41 at 2-3 (filed Jan. 26, 2017) (“Aspire Comments”).

¹⁰ Letter from Sen. Claire McCaskill (D., Mo.), ranking minority member of the Senate Homeland Security and Government Affairs permanent subcommittee on investigations, to the Honorable Ajit Pai, Chairman, FCC (Feb. 6, 2017).

¹¹ See Comments of Comcast Corporation and NBCUniversal Media, LLC, MB Docket No. 16-41 at 7 (filed Jan. 26, 2017) (“Comcast and NBCUniversal Comments”).

platforms.¹² Thus, while Internet-based distribution is a helpful democratizer of voices – and must be allowed to flourish – traditional distribution channels such as cable and DBS remain vital to the survival of independent programmers and the distribution of diverse voices. RFD-TV therefore urges the Commission to promptly adopt its proposal to prohibit unconditional MFN provisions that enable MVPDs to select favorable terms without corresponding obligations and limit independent programmers’ flexibility to enter into unique deals with new distributors.

B. The record supports the Commission’s proposal to prohibit unreasonable ADMs that harm competition.

While Internet-based distribution is not currently a complete substitute for traditional MVPD carriage, it remains essential for independent programmers to meet increasing customer demand for online video and increase their audience viewership. As INSP points out, “[a]lthough alternative distribution platforms are not *today* a substitute for access to MVPDs’ linear platforms, they are certain to become increasingly important in the long run, and it is crucial, for several reasons, that independent programmers’ use of alternative distribution methods not be obstructed, during these formative years, by restrictive ADM provisions.”¹³ The record in this proceeding makes abundantly clear, however, that unreasonable ADM provisions currently imposed on independent programmers preclude distribution of independent programming through alternative outlets such as over-the-top platforms.¹⁴

¹² See, e.g., ACA et al. Comments at 9 (“[W]hile online distribution indeed holds great promise, many independent programmers still depend on traditional linear carriage.”); Cinémoi Comments at 6 (“[R]elying solely on OTT distribution is a one-way ticket to bankruptcy. Linear distribution remains the primary source of new content discovery by viewers and remains the most effective way to develop awareness, brand recognition and popularity.”).

¹³ INSP Comments at 26.

¹⁴ See, e.g., beIN SPORTS Comments at 14; Cinémoi Comments at 6; FUSE Comments at 7.

To be clear, it is not unreasonable for MVPDs to protect their investment in programming. RFD-TV agrees with commenters that suggest that certain restrictions, such as prohibiting online distribution for free for a limited window after the MVPD distributes the content, may be reasonable.¹⁵ The problem, however, is that many ADM provisions are vastly overbroad and go well beyond what is necessary for an MVPD to protect its investment. These provisions foreclose OVDs from accessing valuable content which is necessary in order to successfully compete with traditional MVPDs. RFD-TV therefore urges the Commission to promptly adopt its proposal to prohibit unreasonable ADM provisions in carriage agreements.

Prohibiting unreasonable ADM provisions would also be consistent with conditions recently imposed on Charter in the Charter/Time Warner Cable merger proceeding.¹⁶ There, the Commission prohibited, for seven years, Charter from entering into or enforcing contractual terms that prevent or penalize video programmers from distributing content online.¹⁷ Applying a similar obligation throughout the industry would thus be consistent with recent Commission precedent and help level the playing field among MVPDs. In addition, because an independent programmer's worst ADM restriction effectively limits all of its alternate distribution options, a rule that applies only to one MVPD is ineffective; the prohibition on unreasonable ADMs must apply to all MVPDs to adequately address an industry wide market failure.

AT&T recently recognized the benefits of embracing innovative distribution platforms. In late November 2016, AT&T launched DIRECTV NOW, a video streaming service that, among other programming, offers diverse and independent content such as RFD-TV that is

¹⁵ See, e.g., beIN SPORTS Comments at 13-14; FUSE Comments at 7.

¹⁶ See *Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Assign or Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 31 FCC Rcd 6327 (2016).

¹⁷ *Id.* ¶ 11.

available to viewers anytime, anywhere, and on any device. Less than two months after launching this service, AT&T reported that it added more than 200,000 video subscribers which it stated was “entirely driven” by DIRECTV NOW.¹⁸ AT&T’s DIRECTV NOW service is a shining example of the boundless opportunities that are available when MVPDs decide to embrace, rather than fight, changing market conditions and allow independent programmers to take advantage of new technologies. By adopting its proposed rules prohibiting unreasonable ADM provisions, the Commission will help independent programmers reach the growing online video market and encourage the distribution of unique and diverse programming that consumers demand.

III. THE COMMISSION SHOULD ALSO CONSIDER ADOPTING RULES TO ADDRESS OTHER ANTICOMPETITIVE PRACTICES THAT HARM INDEPENDENT PROGRAMMERS SUCH AS BUNDLING, LENGTHY CONTRACTS, AND HIGH TERMINATION FEES.

Commenters overwhelmingly agree that in addition to adopting its proposed rules prohibiting unconditional MFN and unreasonable ADM provisions, the Commission should also adopt rules that address bundling practices by MVPDs that impede the distribution of diverse, independent programming. As RFD-TV has previously explained, bundling practices often relegate independent programmers to more expensive, less penetrated tiers, which in turn squeeze out independent voices and limit independent programmers’ ability to reach their consumers.¹⁹ ACA notes that “[a] proceeding that aims to enhance the availability of diverse and independent programming but fails to regulate bundling would be an opportunity missed.”²⁰ RFD-TV agrees that if the Commission truly wants to address anticompetitive practices that

¹⁸ AT&T, Current Report (Form 8-K) (Jan. 20, 2017), https://www.sec.gov/Archives/edgar/data/732717/000073271717000006/january20_8k.htm.

¹⁹ RFD-TV Comments at 13.

²⁰ ACA et al. Comments at 2.

inhibit the distribution of diverse and independent programming, it should also consider addressing bundling.²¹

The Commission should also address the high switching costs associated with lengthy subscriber contracts and early termination fees that restrict consumer choice and reduce the disciplining effect of competition.²² As RFD-TV has previously explained, multi-year subscriber contracts and early termination fees raise consumers' switching costs and limit the benefits of MVPD competition.²³ RFD-TV recommends that the Commission adopt a rule that permits MVPD subscribers to cancel, without penalty, a subscription television package within a specific time period, e.g., 90 days, after an MVPD has dropped a programmer from its lineup.

IV. THE COMMISSION HAS THE LEGAL AUTHORITY TO PRESERVE INDEPENDENT PROGRAMMING AND PROTECT CONSUMERS.

A. The record establishes that Section 616 gives the Commission broad authority over carriage agreements that the Commission has not previously exercised.

The record establishes that Section 616's broad statutory language easily encompasses practices that MVPDs engage in to freeze out independent channels and carriage of independent programming by MVPDs.²⁴ Commenters agree that a plain reading of Section 616 of the Communications Act allows the Commission to regulate practices between MVPDs and

²¹ See also beIN SPORTS Comments at 11 ("The Commission must address conglomerate programmers' bundling practices as part of any effort to improve competition in the video market."); Cinémoi Comments at 4 ("To truly address the obstacles independent programmers face and to promote the availability of diverse and independent sources of independent programming, the FCC should revise this NPRM and address bundling"); FUSE Comments at 5-6 ("The Commission should address large, conglomerate, non-independent programmers' bundling practices as part of any effort to improve competition in the video market, or risk rendering its proposed rules ineffective.").

²² See RFD-TV Comments at 12.

²³ *Id.* at 14-15.

²⁴ 47 U.S.C. § 536(a).

independent programmers that limit diversity and hinder competition and thus “provides [the Commission] with the necessary authority to adopt the regulations it proposes.”²⁵ Moreover, as RFD-TV previously explained, based on the parallel structure between Sections 616 and 628 of the Act, it is clear that the specific regulatory requirements under Section 616(a) are simply minimum requirements and therefore do not preclude the agency from establishing regulations to ensure the availability of diverse, independent programming.²⁶

Comcast and NBCUniversal’s claim that the Commission’s reading of Section 616(a) lacks “any limiting principle” is not based on a fair reading of the text.²⁷ As RFD-TV explained in its previous comments, Section 616’s first sentence is not wholly unbounded. The statute specifically limits Section 616’s scope to program carriage agreements between MVPDs and video programming vendors, and is also subject to the Commission’s public interest standard.²⁸ In addition, the Commission can look to the specific prohibitions of Section 616(a)(1)-(3) as guidance for interpreting the introductory text.²⁹ Each of these prohibitions relates to a practice through which MVPDs can harm competition through provisions in programming agreements. The Commission’s proposals are fully consistent with Congress’s directives in those prohibitions.

²⁵ Comments of KSE Media Ventures, LLC, MB Docket No. 16-41 at 7 (filed Jan. 26, 2017). *See also* Aspire Comments at 6-7; Comments of NTCA – The Rural Broadband Association, MB Docket No. 16-41 at 8-9 (filed Jan. 26, 2017).

²⁶ 47 U.S.C. §§ 536(a), 548(c); RFD-TV Comments at 17-18.

²⁷ Comcast and NBCUniversal Comments at 30.

²⁸ RFD-TV Comments at 17.

²⁹ 47 U.S.C. § 536(a)(1)-(3).

B. The Commission’s proposed regulations do not violate the First Amendment.

A few opponents of the Commission’s proposed rules have attempted to manufacture a First Amendment defect, but their arguments are misguided.³⁰ The opposition rests principally on a mischaracterization of the proposed rules. Prohibiting unconditional MFN and unreasonable ADM provisions would neither require an MVPD to carry any particular content nor prohibit it from doing so. Rather, the proposed rules would simply facilitate effective arms’ length marketplace negotiations. Indeed, while many independent programmers might have preferred mandated carriage, under the proposed rules an MVPD would be free to carry or not carry the very same channels it currently carries. For that reason, the proposed rules are quite different (and more limited) than other cable regulations that were challenged under the First Amendment.³¹ In fact, if anything, coercive unconditional MFN and unreasonable ADM provisions imposed by MVPDs on independent programmers restrict *independent programmers’* ability to exercise their right to free speech by limiting their ability to reach consumers.

Comcast suggests that, because an MVPD uses MFNs and ADMs “to protect the value of its investment in high quality programming,”³² any restriction on an MVPD’s conduct is impermissible. But the limited nature of the proposed rules would leave MVPDs with ample means to protect their investment in content. The proposed rules would not, for example, prohibit MFN provisions under which an MVPD accepts related terms and conditions that

³⁰ Comcast and NBCUniversal Comments at 35; Comments of NCTA—The Internet & Television Association, MB Docket No. 16-41 at 8 (filed Jan. 26, 2017).

³¹ See, e.g., *Time Warner Entm’t Co., L.P. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001) (striking down cable horizontal ownership cap and channel occupancy rule); *Comcast Corp. v. FCC*, 579 F.3d 1 (D.C. Cir. 2009) (striking down revised cable horizontal ownership cap). See also *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (challenging the constitutionality of must-carry provisions of the Cable Television Consumer Protection and Competition Act that required carriage of local broadcast television stations on cable television systems).

³² Comcast and NBCUniversal Comments at 36.

accompany a lower price, or ADM provisions that establish reasonable exclusivity windows. Instead, the proposed rules would merely put in place limited prophylactic measures to address a pervasive market failure in the form of MVPDs coercing small and independent programmers to accept contractual provisions that harm competition and consumers.

CONCLUSION

Over the past three years, more than 200,000 RFD-TV viewers have made their voices heard at the FCC and demonstrated that RFD-TV provides unique programming that serves the needs and interests of rural as well as urban Americans and senior citizens.³³ This proceeding is an important first step in a comprehensive effort to promote and protect independent programmers such as RFD-TV. By adopting its proposed rules prohibiting unconditional MFNs and unreasonable ADMs, and addressing harmful MVPD practices such as bundling, lengthy consumer contracts, and high termination fees, the Commission will help encourage a diverse and competitive marketplace for the delivery of multichannel video programming, and allow RFD-TV to bridge the growing divide between urban and rural America.

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³³ See RFD-TV Comments at 18.